Board of Variance Guide

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BOARD OF VARIANCE
GUIDE

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INTRODUCTION

This guide has been prepared by the Ministry of Municipal Affairs, Development Services Branch. It is designed to assist Boards of Variance and local governments* in using the provisions of the Municipal Act** to establish and administer Boards of Variance.

The first chapter outlines the function, structure and membership of Boards of Variance. The second chapter explains the grounds for appeal to a Board of Variance. Chapter Three outlines the type of Board of Variance decisions which are appealable to the courts and the appropriate basis for such appeals. Chapter Four discusses the operational principles and procedures which are to be followed by Boards of Variance. The final chapter addresses some specific problems of interpretation or confusion with procedures that have been brought to the Ministry's attention.

Sample bylaw provisions for establishing a Board of Variance are included as an appendix to illustrate what items may be addressed and how these may be prescribed in a bylaw.

Explanations are meant to clarify the occasions upon which the Board of Variance can be used as an avenue of appeal. Nothing in this publication is to be construed as a guarantee of legal certainty. It is only an interpretation of the intent of the legislation.

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* Throughout this paper a reference to "local government" includes municipalities, regional districts and the Islands Trust.

** This is the second edition of this guide. Revisions have been made to the September, 1984 edition to reflect changes made to provisions affecting Boards of Variance in the Municipal Amendment Act, 1985 which came into effect on December 2, 1985.

CHAPTER ONE

FUNCTION, STRUCTURE AND MEMBERSHIP OF A BOARD OF VARIANCE

Sections 961 and 962 of Part 29 of the Municipal Act specify the authority, structure and function of a Board of Variance.

A. Function

Where a council or regional district board* has enacted a zoning bylaw, or a regional district board has adopted a rural land use bylaw, Section 961 of the Municipal Act requires it to establish a Board of Variance by bylaw. The Board of Variance is an avenue for appeal on the interpretation and the strict application of certain local government provisions and regulations in specific circumstances defined in the legislation. It functions separately from the local government that established it and has its own authority under the Act.

The Board of Variance is not an appeal board for local government policy decisions and it cannot replace decisions of elected officials. The Board is confined to considering variances that will not impact adversely upon a policy decision or change the intent of a bylaw adopted by a municipal council or regional district board. Variances can be granted respecting bylaw requirements for the siting, dimensions, or size of buildings that are designed to deal with the most common circumstances and to be applied universally to these situations. In some special cases general regulations or ones prohibiting structural changes in a non-conforming building or requiring services upon subdivision may result in an undue hardship if applied to a particular site. A person may appeal to the Board for a variance only if the application of these general regulations to his particular site would impose such a hardship on him. The Board may also decide on the correctness of a certain type of decision made by a building inspector. The Board is guided in making its decisions by requirements defined in the legislation and explained more fully in Chapter Two of this guide.

B. Structure and Membership

A conventional rule of procedural fairness or "natural justice" is that there should be no bias on the part of the members of a tribunal. Bias will be deemed to exist if there is any conflict of interest on the part of any person participating in

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* A reference to a council or regional district board in this document includes the thirteen local trust committees of the Islands Trust.

the tribunal's deliberations. The legislation prescribes who cannot be a member of the Board of Variance and how appointments and removals from office can be made.

1. Appointments

In a municipality, a Board of Variance will consist of three or five persons, depending upon the population size of the municipality. In a regional district there may be several Boards of Variance, one for each rural land use or zoning bylaw area and each Board will have three members.

The council of a municipality with a population of 25,000 or less, or the board of a regional district, will appoint one member, the Minister of Municipal Affairs will appoint one member and these two appointees will then appoint the third member (Sections 962(2) and 962(4)). The council of a municipality with a population greater than 25,000 shall appoint two members, the Minister of Municipal Affairs shall appoint two members and these four appointees will then appoint the fifth member (Section 962(3)).

The members of the Board of Variance cannot be members of an advisory planning commission, elected officials or employees of the local government which appoints them. This is because their responsibilities include both assessing the correctness of an interpretation of the amount of damage given by the local government building inspector and modifying the strict application of local government regulations.

2. Removal From Office

Members appointed by a local government may be removed at any time by resolution of that local government. Likewise, the appointees of the Minister of Municipal Affairs may be removed by the Provincial government through an order of the Lieutenant Governor in Council. The person appointed by the other members of the Board of Variance may be removed by the Lieutenant Governor in Council with the approval of the local government.

The legislation does not require that reasons be given for the removal of a member of the Board of Variance.

CHAPTER TWO

APPEALS TO BOARDS OF VARIANCE

This chapter reviews the exact wording of the legislation which establishes the responsibilities of the Board of Variance. An explanation is given for each of the factors a Board must consider in making decisions specifically authorized by the legislation. The most significant sections of the Municipal Act which refer to Boards of Variance are cited in full in Appendix 1.

A. Categories of Appeal to Boards of Variance

The duties of the Board are specified in Section 962 of the Municipal Act. There are four grounds for appeal each of which involve different considerations. The precise wording of the Act is quoted here, and where there is a reference to another section, that wording is given as well. The four categories of appeal have been characterized as follows: 1) relaxation of zoning regulations; 2) extension of non-conforming uses; 3) relaxation of servicing requirements; and 4) reconstruction of a non-conforming building.

The first three types of appeals have common restrictions on the type of variance a Board is authorized to grant. For that reason they will be grouped. The qualifiers found in Sections 962(2) and 962(4) are then explained.

1. Relaxation of Regulations for Locating a Building on a Lot

Probably the most common type of appeal heard by Boards of Variance is a request for relaxation of certain siting regulations under Section 962(1)(a)(i) which states that an individual may submit an appeal:

> "962(1) - Where a person alleges that
>
> (a) compliance with
>
> (i) a bylaw respecting the siting, dimensions, or size of a building or structure, or the siting of a mobile home in a mobile home park,
>
> ...
>
> would cause him undue hardship,"

The variations requested under this section deal only with buildings and structures in terms of their size, dimensions and location on a parcel. The Board cannot rule on policy issues of the local government such as an increase in density or a change in use. In common with the next two categories of decisions listed below, variances granted under Section 962(1) are limited by Sections 962(2) and 962(4) which will be explained subsequently.

2. Extension of Non-Conforming Uses

A non-conforming use is not confined to only that part of a building occupied when non-conformity was established but can be extended throughout the whole building. However, an owner needs special approval from the Board of Variance under Section 962(1)(a)(ii) to make internal structural alterations or to add on to the building provided that the extension or alteration would, when completed, involve no further contravention of the bylaw. The section states an appeal can be made:

> "962(1) - Where a person alleges that
>
> (a) compliance with
> ...
>
> (ii) the prohibition of a structural alteration or addition under section 970(5), or
> ...
>
> would cause him undue hardship,"

Section 970(5) specifies:

> "970(5) - A structural alteration or addition, except one that is required by an enactment or permitted by a board of variance under section 962(2), shall not, subject to subsection (9), be made in or to a building or structure while the non-conforming use is continued in all or any part of it."

These sections deal only with structural alterations or additions to buildings or structures the use of which is non-conforming. Section 970(9) limits Board of Variance decisions made under 962(1)(a)(ii) to those changes which would not further contravene siting, size, dimension or parking requirements.

A structural change is not the same as a repair; rather, it is a modification to a floor, or roof, or bearing wall whether an internal or an outside wall. A new doorway in a bearing wall would be a structural change whereas new panelling or new shingles on a roof would not.

When structural alterations of a non-conforming building have been approved by a Board of Variance, these changes must also meet the requirements of statutes including regulations under statutes, and any other bylaw provisions applicable at the time.

3. Relaxation of Servicing Requirements

Boards of Variance may approve the relaxation of servicing requirements for subdivisions. As Section 962(1)(a)(iii) states an appeal can be made:

> "962(1) - Where a person alleges that
>
> (a) compliance with
> ...
>
> (iii) a subdivision servicing requirement under section 989(1)(c) in an area zoned for agricultural or industrial use,
>
> would cause him undue hardship,"

Section 989(1)(c) specifies:

> "989(1)(c) - require that within a subdivision, a water distribution system, a fire hydrant system, a sewage collection system, a sewage disposal system, a drainage collection system or a drainage disposal system be provided, located and constructed in accordance with the standards prescribed in the bylaw, and the bylaw may prescribe different standards for different zones."

This appeal is only available where land is zoned for agricultural or industrial uses and all the qualifiers of Sections 962(2) and 962(4) apply.

Qualifiers

The three categories of appeal in Section 962(1)(a) are all based on the demonstration of undue hardship and are limited by the following:

> "962(2) - On an application under subsection (1)(a), the board of variance may, after hearing the applicant and any person notified under subsection (5), and on finding that undue hardship would be caused to the applicant if the bylaw or section 970(5) is complied with, order that a minor variance be permitted from the requirements of the bylaw, or that the applicant be exempted from section 970(5), so long as the variance or exemption does not
>
> (a) result in inappropriate development of the site,
>
> (b) substantially affect the use and enjoyment of adjacent land,
>
> (c) vary permitted uses and densities under the applicable bylaw, or
>
> (d) defeat the intent of the bylaw."

This section requires that a Board hear an applicant and the owners and occupiers of the subject and adjacent properties. The wording of the legislation makes it clear that the decision as to whether undue hardship is demonstrated is the Board's to make. It must be satisfied a variation is justified by the presence of undue hardship. The scope of the variation, however, is limited by the word "minor" and by (a) to (d) of Section 962(2). The Board must be satisfied that all the criteria listed have been met. Each is explored below:

a. "Hardship" - The application of requirements of the bylaw must create a hardship. Increased cost or loss of an amenity is a hardship but is unlikely to be a sufficient reason on its own.

b. "Undue" - The hardship created must be undue. The intent of this term is to limit the concerns of the Board to types of hardship that result from aspects of the site as opposed to those which are personal to or generated by the owner. If a characteristic of a site is that bedrock protruding in the site's building area makes compliance with the siting provisions of a bylaw difficult and unreasonable, the hardship created, through no fault of the property owner himself, is undue. If other properties in the zone do not have the protruding rock, they would not be subject to the same degree of hardship.

   The difficulty in determining what is undue hardship revolves around whether the hardship would have been a hardship for everyone. If compliance with the general setback regulations is difficult or expensive but that is the case for all properties within that zone, then one could not argue that there is undue hardship. If a circumstance penalizes one or only a few owners, it would be unfair and unduly onerous.

c. "Minor variance" - This terminology limits the scope of the variances the Board may allow. Relaxation of a requirement of a bylaw cannot be a substantial variation. Because the statute limits the Board's authority in this way, the Board must consider this point most carefully. While the decision of the Board is final, the courts may review an appeal on a procedural or jurisdictional issue, including the scope or degree of a variation permitted by the Board.

d. "Inappropriate development" - The legislation does not limit the interpretation of "inappropriate" solely to an opinion of the Board. It states that the variance must not be "inappropriate". A simple test would be to compare the proposed development with that existing on surrounding lots. The elected officials, to some measure, have defined what is appropriate by specifying general regulations in a bylaw. If these are "appropriate" for surrounding properties, the Board should determine why they would not be equally appropriate for the particular property which is the subject of appeal.

e. "Substantially affect" - The full wording in the legislation refers to affecting the use and enjoyment of adjacent land which includes a full range of considerations such as noise, dust, destruction of views as well as safety concerns. It is the Board's

obligation to determine if the variance requested would cause significant impact on surrounding properties. A petition circulated by the applicant to adjoining owners indicating consent to the variance, although a helpful indication, does not satisfy this requirement. Ownership changes and what does not offend one neighbour may another. The Board must decide the issue.

f. "Vary uses and densities" - Variations allowed by the Board cannot change permitted use or density. Such changes are not minor. They may only be made by elected officials through a zoning bylaw amendment which is subject to full public scrutiny.

The issue of density may add complexity. Variances affecting setbacks, the size and dimensions of a building, site coverage, or the floor space ratio could result in allowing change in the density of a use. However, as long as any increase in density is within the limits established in the zoning bylaw it is within the permitted density.

One example would be where relaxation of a 20 metre setback for an apartment building may allow a larger building to be constructed on the site. It should be clear in the decision that such a relaxation does not give any special right to the developer to increase the number of units over that allowed by bylaw simply because a larger building is now possible. More units beyond the limits of the bylaw would be an increase in density.

g. "Defeat the intent of the bylaw" - The Board must try to determine, from reading the bylaw, what the local government intended to be the type of neighbourhood established by the zoning regulations. It must decide this by reading the bylaw because that is the only valid definition of the council or regional district board's intent.(1),(2) Any variance granted by the Board should not disrupt the basic harmony with other developments within a zone.

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1 George Alex Rogers et al v. The Corporation of the District of Saanich et al (1983), 22, M.P.L.R. 1, Mr. Justice Locke

2 Capital Regional District v. The Corporation of the District of Saanich (1980), 24, B.C.L.R. 154, Mr. Justice Bouck

Prohibitions

The limitations placed on the nature of the orders a Board may make as listed in Section 962(2) and described above are further restricted by those matters listed in Section 962(4).

> "Section 962(4) - The board of variance shall not make an order under subsection (2) where the order would
>
> (a) be in conflict with
>
> (i) a covenant registered under section 24A of the Land Registry Act, R.S.B.C. 1960, c. 208, before the repeal of that Act, or section 215 of the Land Title Act, or
>
> (ii) section 27 of the Heritage Conservation Act,
>
> (b) deal with a matter that is covered in a land use contract or a permit under Division (5), or
>
> (c) deal with a flood plain specification under section 969(2)."

This section provides a checklist for a Board to aid in its determination of jurisdiction.

The Board of Variance is not an avenue of appeal against Provincial regulations or negotiated agreements between developers and local governments or approving officers. All of the matters contained within Section 962(4) fall within one of those two catetories. Other remedies are available to people wishing to modify these matters.

4. Reconstruction of a Non-Conforming Building

Certain decisions of a building inspector regarding repair or reconstruction of a building which does not conform to the bylaws can be appealed to a Board of Variance under Section 962(1)(b).

"962(1) - Where a person alleges that

...

(b) the determination by a building inspector of the amount of damage under section 970(8) is in error,"

Section 970(8) specifies:

"970(8) - Where a building or a structure, the use of which does not conform to the provisions of a rural land use bylaw or a bylaw under this Division is damaged or destroyed to the extent of 75% or more of its value above its foundations, as determined by the building inspector, it shall not be repaired or reconstructed except for a conforming use in accordance with the bylaw."

Although in this type of appeal the decision has the effect of allowing or disallowing a use contrary to a bylaw, the issue before the Board of Variance is simply whether or not the building inspector's decision on the degree of damage is correct. If an applicant believes something less than 75% of the value of his building has been destroyed, but the building inspector believes 80% has been destroyed, that decision may be appealed to the Board of Variance. If the Board concurs with the inspector, the owner of the non-conforming structure may not rebuild or repair that structure as the protection afforded by Section 970(8) for continuing the non-conforming use would cease. However, if the Board concurs with the applicant and believes less than 75% has been destroyed it can allow the appeal and the owner may rebuild.

The wording of Section 962(1)(b) does not restrict the applicant to being the owner of the building. For example, a neighbour or corporate body may challenge a decision of a building inspector if he has claimed 70% is destroyed, and they feel 80% is destroyed and prefer not to have the non-conforming use continue in a rebuilt building.

Section 962(3) clarifies the effect of a successful appeal:

> "962(3) - On an application under subsection (1)(b), the board of variance may set aside the determination of the building inspector and make the determination under section 970(8) in its place."

This gives immediate effect to the decision of the Board. The applicant can take action without having to use a court to direct a reluctant building inspector, who has been found in error, to make a different determination.

B. Time Limits

Decisions of a Board of Variance apply to land irrespective of ownership, and are lawful for the existing and subsequent owners unless the Board has limited the time period for initiation of the variance in the original order as provided for in Section 962(7).

> "962(7) - Where a board of variance, in respect of an application under subsection (1)(a), orders that a minor variance be permitted or an exemption from section 970(5) be allowed, it may order that, unless the construction of the building, structure or mobile home park is completed within a time fixed in the order, the permission or exemption terminates and the bylaw or section 970(5), as the case may be, applies."

For example, a Board may feel that a minor variation would be appropriate if the development was carried out before infilling or development on adjacent properties. Subsequent development on adjacent properties could be designed or sited to take account of the variation. However, ten years later, it may not be appropriate, because other construction would have taken place without anticipation of a modified siting or servicing regulation. In such circumstances the Board can use the provisions of Section 962(7) to ensure the variance is acted upon within a reasonable time frame. It is entirely a decision of the Board to employ this provision or not in any specific case.

C. Summary of Categories of Appeal

Table 1 provides an overview of the four types of appeals that can be made to the Board of Variance, offers examples of each category and notes the availability of further appeals from Board of Variance decisions. Appeals from Board of Variance decisions are discussed in more detail in Chapter Three.

TABLE 1

TYPES OF APPEAL TO BOARDS OF VARIANCE

CATEGORIES OF APPEAL	EXAMPLE	FURTHER APPEAL
A. On the Basis of Undue Hardship Only		
1. Relaxation of regulations for locating a building on a lot. Section 962(1)(a)(i)	A person requests a variation from a bylaw provision for siting, shape or size of a building or for siting in a mobile home park because compliance would, in his particular case, create an undue hardship. The Board can allow a minor variation to the bylaw provisions if all the criteria listed in Section 962(2) can be met.	Procedural matters can be challenged in a court of law, but a decision made by the Board of Variance on the merits of the case cannot.
2. Extension of non-conforming uses. Section 962(1)(a)(ii)	A person requests approval for putting in a new fire exit door on an outside wall or for adding a new room to a building whose use is non-conforming to the zoning or rural land use bylaw. He alleges denial of such approval could cause him undue hardship. The Board may approve the structural change providing the construction complies with the building code and all other conditions of Section 962(2).	Procedural matters can be challenged in a court of law, but a decision made by the Board of Variance on the merits of the case cannot.

CATEGORIES OF APPEAL	EXAMPLE	FURTHER APPEAL
3. Relaxation of Servicing Requirements Section 962(1)(a)(iii)	An owner of property proposed for subdivision in an area zoned for agricultural or industrial use requests relaxation of the subdivision servicing bylaw provisions. He alleges undue hardship in supplying the sewage, water or drainage systems specified in the bylaw. The Board can exempt him from the requirements providing all the criteria of Section 962(2) are met.	Procedural matters can be challenged in a court of law, but a decision made by the Board of Variance on the merits of the case cannot.
B. <u>On the Basis of Error</u>		
4. Reconstruction of a non-conforming building or structure. Section 962(1)(b)	Following a fire in a building where the current use is non-conforming to the bylaw, a building inspector determines the extent of damage is 75% or greater. This means the building cannot be reconstructed and used for the nonconforming use. The applicant disagrees with the inspector's assessment and appeals his decision to the Board of Variance. The Board can decide the extent of the damage and nullify the inspector's assessment.	The applicant may appeal a decision of the Board of Variance to the County Court and that decision may be further appealed to a higher court by either the applicant or the local government. Procedural disagreements can also be decided by the court.

CHAPTER THREE

APPEALS FROM BOARD OF VARIANCE DECISIONS

Any decision of a tribunal like the Board of Variance may be assessed by the courts under the Judicial Review Procedure Act which requires that proper procedure is followed. In addition some Board of Variance decisions may be appealed to the courts as incorrect.

Table 1 illustrates that the four categories of decisions made by a Board of Variance fall into two types. Sections 962(8) and 962(9) provide that one type can be appealed in court and the other cannot.

> "962(8) - The applicant may appeal a decision of the board of variance under subsection (3) to the County Court.
>
> 962(9) - A decision of the board of variance under subsection (2) is final."

A Type A decision in Table 1 is referred to in Section 962(9). It is an opinion on the justification for a variance and modifies the application of a general regulation on the basis of the justification. These decisions, provided for in Section 962(1)(a), are matters of opinion delegated by statute to the Board.

A Type B decision in Table 1 is referred to in Section 962(8). These decisions, provided for in Section 962(1)(b), are the Board's assessment of the building inspector's determination of damage and can be challenged in the courts as an incorrect assessment of the facts.

A. Decisions Not Appealable to the Court

The first category of decision is one for which the Board of Variance is given complete authority. The legislation allows the Board under certain circumstances to modify some provisions of the general regulations of relevant local government bylaws.

The actual decisions in this category may not be appealed in the conventional sense, although they may be reviewed for procedural fairness under the Judicial Review Procedure Act and for compliance with the considerations imposed on the Board by Section 962(2).

Where the Board has determined that undue hardship has or has not resulted, that determination shall be taken as fact by the courts and may not be subject to appeal,(4) but may be subject to judicial review.

B. Decisions Appealable to the Court

The second category of decision is based on errors in judgement. An individual who feels that a decision by a building inspector on the extent of damage to a non-conforming building is incorrect, may appeal to the Board of Variance to review that decision. The Board can decide if the building inspector's decision was correct and if not, can replace his assessment with its own. The Board's decision can be appealed to the County Court.(3)(4) A decision of the County Court on a Board of Variance decision can subsequently be appealed to a higher court.

Only the initiator of the original appeal to the Board of Variance can ask the courts to review a Board decision. For example, a neighbour who objects to a non-conforming use may believe a building inspector was in error in assessing damage at 60% of the building thereby allowing the owner to rebuild. The neighbour could apply to the Board of Variance to find 75% or greater was destroyed so the building could not be rebuilt. If the neighbour lost such an appeal he may wish to pursue it further in court but if he won the appeal, the owner or local government could not challenge the Board's decision in court. Once a matter is in the court system however, and a county court has ruled, further appeals in the court system could be initiated by other parties.

C. Judicial Review

Under the Judicial Review Procedure Act the courts can require a Board to re-hear an appeal on the basis of a procedural error of law, such as improper notice, lack of Board jurisdiction or that the qualifiers to a decision were not satisfied. In such cases the initial decision of the Board is invalid and must be made again. The court may find by the facts of the case that the Board did not have the right to consider a matter because a requirement of the Act was not satisfied. The court, under Section 7 of the Judicial Review Procedure Act has the power to

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3 Regional District of Nanaimo v. Gordon M. Holtby (1979), B.C.D. Civ. 3004-02, Judge Millward

4 Inglis v. The Corporation of the Village of Qualicum Beach, (1981), 30 B.C.L.R. 270, Judge Melvin

set aside any order made by the Board on the case before them because they did not have authority to make that decision. However, the courts may not direct that a certain decision be made following an appeal on procedural matters, as only the procedural fairness or jurisdiction is being challenged not the correctness of the final decision. To answer such a challenge, the Board may have to demonstrate that evidence existed which allowed it to assess the qualifying criteria the statute requires be considered, and that those considerations were in fact made. If the court felt correct procedures were not followed or the Board had no evidence upon which to base an opinion, it may order the Board to re-hear an appeal. Or under Section 7 of the Judicial Review Procedure Act instead of referring a matter back to the Board of Variance the courts have the power to set aside the decision of the Board of Variance and put an end to the matter.

Here are two examples of how the Judicial Review Procedure Act has been used to require Boards of Variance to re-hear appeals.

1. Notices must be mailed to owners of properties adjacent to the property subject to appeal. In one court case, notices were not mailed to owners of properties separated by a 50 foot road allowance from the subject property. The court found these owners were "adjacent" and should have received notice. The Board of Variance had to re-hear the appeal after giving notice. The court did not direct the original decision be changed, only that the application be re-heard.(5)

2. A Board must hear an appeal regarding whether a structure results in inappropriate development of the site. In this court case the Board had a policy to not hear an appeal after construction. The court ruled that a policy cannot override a statutory duty, and ordered that the Board of Variance policy be quashed and the matter be remitted to the Board for a hearing on its own merits.(6)

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5 The Owners, Strata Plan No. 60 v. Town of Sidney (1981), B.C.D. Civ. 3006-01, Judge Wallace

6 Hale v. White Rock Board of Variance (1985), N.W.R., A850411, Madam Justice Proudfoot

CHAPTER FOUR

OPERATIONAL PRINCIPLES AND PROCEDURES

The Municipal Act requires that a Board of Variance follow certain procedures but allows other procedures to be prescribed by a bylaw of the local government establishing the Board.

Members of the Board of Variance do not receive compensation for their work. However, their individual expenses and all of the operating expenses of the Board are covered in the annual budget of the local government.

The legislation requires that the chairperson be selected by the members of the Board themselves and allows the chairperson to appoint a Board member to act as chairperson in situations where he or she must be absent.

The Act requires that before hearing an application the Board must notify the owners and occupiers of the land subject to appeal and of all real property adjacent to the property subject to appeal. The notice must say what is being appealed, and the time and place the appeal will be heard.

The responsibility of local government extends only to the establishment of the Board and payment of operating expenses. The Board operates separately and autonomously under the specific authority of the Municipal Act, and there are no requirements in the Act for the local government to be notified of every appeal. The local government may, by bylaw, set procedures not covered by the Act itself providing always that such procedures are generally fair.

The following two sections of this chapter identify procedural items that may be established by bylaw. A description of some considerations in determining procedural issues is included for illustrative purposes.

A. General Principles

A local government may specify in its bylaw establishing the Board of Variance, procedures for giving public notice of any hearing that is held, the manner in which appeals are to be brought to the Board's attention, and when hearings are to be held in public. The legislation requires that the hearing of an appeal involving undue hardship provide an opportunity for the applicant and the owners and occupiers of the subject property and adjacent property to be heard. The only discretion in such cases is whether others may be notified or heard.

The procedural bylaw may only augment legislative requirements but may not lessen the statutory authority of a duly constituted Board. The adjectives used within Section 962(2) of the legislation, such as "substantially", and "inappropriate", indicate the discretionary nature behind some of the decisions which the Board can make. These terms indicate the intent of the Legislature to enable some flexibility in the application of local government regulations. A Board of Variance's decision involving the relaxation of local government regulations cannot be changed by the local government, a higher court, or the Minister and cannot be reversed by succeeding Boards. The bylaw, then, cannot grant the local government any special authority over functions of the Board.

The local government bylaw establishing procedures cannot require that local government be heard on every appeal. That would be interpreted as trying to assign special rights to itself which may prejudice the hearing. However, it may allow the Board to get information from technical staff on the requirements of the zoning bylaw and the physical dimensions and characteristics of a lot.

For those appeals that challenge an official's interpretation of a bylaw provision, a procedural bylaw may require that the official whose actions are being reviewed be allowed to report to the Board. This grants the official the right to explain his interpretation which is the subject of the appeal and complies with commonly accepted principles of natural justice or procedural fairness that protect a person whose judgement has been questioned.

B. Hearings

The Board of Variance is given authority to hold its own hearings on any matters before it. The Board may decide whether a particular hearing will be public or this may be established by a local government in the procedural bylaw. There is no rule that specifies when a Board of Variance hearing should be public, although it is possible that some new precedents will develop as a result of the Charter of Rights and Freedoms. To avoid any problems in this regard it may be advisable to hold hearings in public and then have deliberations in-camera.

The legislation ensures that the applicant and occupiers of the subject property and adjacent properties have the right to be heard by the Board. This means then, that some measure of public scrutiny will be present at all hearings and that none can be closed to those people most directly affected.

The Act requires that all decisions of the Board be a matter of public record and that any interested person can have access to them. The results of hearings are therefore recorded and made available for public review during normal business hours.

C. Sample Bylaw Provisions

The reader with an interest in procedural matters may wish to examine the "sample bylaw provisions" in Appendix 2, which indicate how procedures described in this chapter can be defined. The sample bylaw is designed to ensure that all appeals are treated promptly and does not require that all hearings be held in public, which is left to the discretion of the Board. The bylaw assumes all parties involved in the issue have a right to be heard.

CHAPTER FIVE

POTENTIAL PROBLEMS

A. Development Permits

A community plan may provide for the issuance of development permits by a council or regional board in order to vary or supplement certain regulations under special circumstances defined in the legislation. Any subdivision or construction in the areas identified must satisfy the conditions of a permit before construction.

An owner may apply for, and a local government may issue, a development variance permit which varies provisions of a rural land use bylaw or other bylaws adopted under Division 4 or 7 of Part 29 of the Municipal Act with the agreement of the land owner. Such permits are voluntary and cannot vary the use or density of use of land or flood plain specifications of the Ministry of Environment in a designated flood plain.

Variances granted by a Board of Variance are not the same as development permits. The Board deals only with matters where, in its opinion, there has been a staff error or undue hardship will be incurred by an individual if he must comply strictly with certain regulations. Development permits and development variance permits are entirely different.

This does not mean that an application for one appeal precludes an application to the other authority. If an appeal to a Board of Variance fails because the Board does not believe the variance is justified or because undue hardship has not been shown, and thus the appeal is not within its jurisdiction, the applicant may approach the council or regional district board in an attempt to achieve the same end through a development variance permit. In this case a local government would be changing its policy which a Board of Variance is not authorized to do. However, development variance permits are intended to apply only where a development is to be initiated. They should not be used as a retroactive agreement to legalize the contravention of a siting provision.

The Board cannot hear an appeal to vary a provision in a development permit or development variance permit. Only a council or regional district board may amend a development permit or development variance permit. These involve actually changing a regulation which is outside the jurisdiction of a Board of Variance.

B. Liability

There is no protection within the Municipal Act against liability for decisons made by elected, appointed, or employed individuals. Because the authority does not exist in the legislation, it cannot be created by enactment of a lower level of government. Therefore, it is not possible for a local government, through a bylaw or any other enactment, to remove liability for the responsibilities of any bodies or staff appointed under the authority of the Municipal Act.

However, the courts commonly will not attach liability to a decision made in good faith. If procedures and actions taken were fair, action for compensation for damages cannot be initiated against a member of a judicial or quasi-judicial tribunal on the basis of any mistaken decision made by that tribunal. As long as a member of a Board of Variance acts in a legal and responsible manner, a decision made by that member is not a basis for liability.

C. Constitutional Challenges

The Charter of Rights and Freedoms, Section 15, equality provisions may be used to challenge Board of Variance decisions, i.e., equal protection and equal benefit of the law is guaranteed. In order to answer such challenges, Boards are encouraged to make material relating to pending appeals available to the public so interested parties will know what the appellant is requesting. See Section 4(g) of the sample bylaw. Appellants should be encouraged to state their case in their notice of appeal on a form standard to all appeals.

SUMMARY

This publication is intended to clarify the purpose and function of a Board of Variance under the provisions of the British Columbia Municipal Act.

The provisions of the Municipal Act do not extend any special rights of representation to the local government that establishes a Board of Variance. These Boards function separately under their own authority. As a quasi-judicial tribunal they must be meticulous in preventing any bias or appearance of bias in their actions.

A Board of Variance may not make decisions that change the intent and purpose of bylaws adopted by a local government. It may allow minor variance of some provisions of bylaws under specified circumstances. Members of a Board of Variance are not elected and they may not make or change policy decisions of local government.

A bylaw to establish a Board of Variance can set down very general procedures or prescribe detailed procedures for presentation of evidence and notification. The level of detail appropriate will depend on the needs of the individual area. The sample bylaw provisions in Appendix 2 illustrate the maximum formality from which each jurisdiction may select a level of detail suitable for its needs.

The legislation makes the Board of Variance responsible for maintaining a record of its decisions and for ensuring this is available for public scrutiny.

APPENDIX 1

SECTIONS OF THE MUNICIPAL ACT WHICH REFER TO THE BOARD OF VARIANCE

Board of variance

961.(1) Where a local government has adopted a zoning bylaw or a board has adopted a rural land use bylaw, it shall, by bylaw, establish a board of variance.

(2) Where the population of a municipality is 25,000 or less, the board of variance shall consist of one person appointed by the local government, one person appointed by the minister and one person appointed by the other 2 appointees.

(3) Where the population of the municipality is more than 25,000, the board of variance shall consist of 2 persons appointed by the local government, 2 persons appointed by the minister and one person appointed by the other 4 appointees.

(4) Where a board has adopted a separate zoning bylaw or rural land use bylaw applicable to separate areas, it may appoint a board of variance for each of those separate areas consisting of one person appointed by the board, one person appointed by the minister and one person appointed by the other 2 appointees.

(5) An appointment under subsections (2) to (4) is for the later of

(a) 3 years, or

(b) where no successor has been appointed at the end of the 3 year period, until the time that a successor is appointed.

(6) A person who is

(a) a member of the advisory planning commission or of the local government, or

(b) an officer or employee of the local government

is not eligible to be appointed to a board of variance.

(7) The members of the board of variance shall elect one of their number as chairman.

(8) The chairman may appoint a member of the board of variance as acting chairman to preside in his absence.

(9) Where a member of a board of variance ceases to hold office, his successor shall be appointed in the same manner as the member who ceased to hold office, and, until the appointment of the successor, the remaining members constitute the board of variance.

(10) A local government may remove its appointee at any time.

(11) The Lieutenant Governor in Council may

(a) remove the minister's appointee at any time, and

(b) on the recommendation of a local government, remove the person appointed by the other appointees.

(12) The bylaw establishing a board of variance shall set out the procedures to be followed by the board of variance, including the manner by which appeals are to be brought and notices under section 962(5) are to be given.

(13) A member of a board of variance shall not receive compensation for his services as a member, but he shall be paid reasonable and necessary expenses that arise directly out of the performance of his duties.

(14) The local government shall, in its annual budget, provide for the necessary funds to pay for the costs of the board.

Jurisdiction of board of variance

962.(1) Where a person alleges that

(a) compliance with

(i) a bylaw respecting the siting, dimensions or size of a building or structure, or the siting of a mobile home in a mobile home park,

(ii) the prohibition of a structural alteration or addition under section 970(5), or

(iii) a subdivision servicing requirement under section 989(1)(c) in an area zoned for agricultural or industrial use

would cause him undue hardship, or

(b) the determination by a building inspector of the amount of damage under section 970(8) is in error,

that person may make application to a board of variance for an order under subsection (2) or (3).

(2) On an application under subsection (1)(a), the board of variance may, after hearing the applicant and any person notified under subsection (5), and on finding that undue hardship would be caused to the applicant if the bylaw or section 970(5) is complied with, order that a minor variance be permitted from the requirements of the bylaw, or that the applicant be exempted from section 970(5), so long as the variance or exemption does not

(a) result in inappropriate development of the site,

(b) substantially affect the use and enjoyment of adjacent land,

(c) vary permitted uses and densities under the applicable bylaw, or

(d) defeat the intent of the bylaw.

(3) On an application under subsection (1)(b), the board of variance may set aside the determination of the building inspector and make the determination under section 970(8) in its place.

(4) The board of variance shall not make an order under subsection (2) where the order would

(a) be in conflict with
(i) a covenant registered under section 24A of the Land Registry Act, R.S.B.C., 1960, c. 208, before the repeal of that Act, or section 215 of the Land Title Act, or
(ii) section 27 of the Heritage Conservation Act,

(b) deal with a matter that is covered in a land use contract, or a permit under Division (5), or

(c) deal with a flood plain specification under section 969(2).

(5) Where a person makes an application under subsection (1)(a), the board of variance shall notify all owners and occupiers of the land that is

(a) the subject of the application, or

(b) adjacent to land that is the subject of the application.

(6) The notice shall state the subject matter of the application and the time and place where the application will be heard.

(7) Where a board of variance, in respect of an application under subsection (1)(a), orders that a minor variance be permitted or an exemption from section 970(5) be allowed, it may order that, unless the construction of the building structure or mobile home park is completed within a time fixed in the order, the permission or exemption terminates and the bylaw or section 970(5), as the case may be, applies.

(8) The applicant may appeal a decision of the board of variance under subsection (3) to the County Court.

(9) A decision of the board of variance under subsection (2) is final.

(10) A board of variance shall maintain a record of all its decisions and shall ensure that the record is available for public inspection during normal business hours.

Non-Conforming Uses

970.(1) Where land, a buildng or a structure is lawfully used, at the time of the enactment of a rural land use bylaw or adoption of a bylaw under this Division, but that use does not conform to the bylaw, the use may be continued as a non-conforming use, but if the non-conforming use is discontinued for a continuous period of 6 months, any subsequent use of the land, building or structure becomes subject to the bylaw.

(2) The use of land, buildings or structures for seasonal uses or for agricultural purposes is not discontinued as a result of normal seasonal or agricultural practices, including

(a) seasonal, market or production cycles,

(b) the control of disease or pests, or

(c) the repair, replacement or installation of equipment to meet standards for the health or safety of people or animals.

(3) A building or structure that is lawfully under construction at the time of the enactment of a rural land use bylaw or the adoption of a bylaw under this Division shall, for the purpose of this section, be deemed to be a

building or structure existing at that time and to be then in use for its intended purpose as determined from the building permit authorizing its construction.

(4) Where subsections (1) and (2) authorize a non-conforming use of part of a building or structure to continue, the whole of that building or structure may be used for that non-conforming use.

(5) A structural alteration or addition, except one that is required by an enactment or permitted by a board of variance under section 962(2), shall not, subject to subsection (9), be made in or to a building or structure while the non-conforming use is continued in all or any part of it.

(6) In relation to land, subsection (1) or (4) does not authorize the non-conforming use of land to be continued on a scale or to an extent or degree greater than that at the time of the enactment of the rural land use bylaw or the adoption of the bylaw under this Division.

(7) For the purposes of this section, a change of owners, tenants or occupants of any land, or of a building or structure, does not, by reason only of the change, affect the use of the land or building or structure.

(8) Where a building or a structure, the use of which does not conform to the provisions of a rural land use bylaw or a bylaw under this Division is damaged or destroyed to the extent of 75% or more of its value above its foundations, as determined by the building inspector, it shall not be repaired or reconstructed except for a conforming use in accordance with the bylaw.

(9) Where

(a) the siting, size or dimensions of
    (i) a building or structure, or
    (ii) off-street parking or loading spaces, or

(b) the number of off-street parking or loading spaces

do not meet the requirements of a rural land use bylaw or a bylaw under this Division that is adopted after they were constructed, they may be repaired, extended or altered, but only to the extent that the repair, extension or alteration would, when completed, involve no further contravention of the bylaw beyond the contravention that existed at the time that the repair, extension or alteration was commenced.

Subdivision servicing requirements

989.(1) A local government may by bylaw regulate and require the provision of services in respect of the subdivision of land, and for that purpose may

(a) regulate and prescribe minimum standards for the dimensions, locations, alignment and gradient of highways in connection with subdivisions of land, and may make different regulations for different uses and for different zones in the municipality or regional district,

(b) require that within a subdivision, highways, boulevards, boulevard crossings, transit bays, street lighting or underground wiring be provided, and be located and constructed in accordance with the standards prescribed by the bylaw, and the bylaw may prescribe different standards for different zones and highway classifications and for different abutting uses of land, and

(c) require that within a subdivision, a water distribution system, a fire hydrant system, a sewage collection system, a sewage disposal system, a drainage collection system or a drainage disposal system be provided, located and constructed in accordance with the standards prescribed in the bylaw, and the bylaw may prescribe different standards for different zones.

(2) Where a local government, an improvement district or greater board operates a community water or sewer system, or a drainage collection or disposal system, the local government may by bylaw require that a system referred to in subsection (1)(c) be connected by trunk mains to the local government, improvement district or greater board system, in accordance with standards prescribed in the bylaw.

(3) Where there is no community water system, the local government may by bylaw require that each parcel to be created by the subdivision have a source of potable water having a flow capacity at a rate prescribed in the bylaw.

APPENDIX 2

SAMPLE BYLAW PROVISIONS

Board of Variance

1. Establishment

Pursuant to Section 961 of the Municipal Act, a Board of Variance is hereby established.*

2. Secretary

The council (or regional district board) shall appoint a Secretary to the Board of Variance. The responsibilities of the Secretary are:

a) to receive notices of appeal,

b) to determine whether the appeal seeks to vary a matter covered in a land use contract, a permit under Division 5 of Part 29, a flood plain specification under Section 969 of the Municipal Act or a registered covenant, which are outside the jurisdiction of the Board of Variance or whether the appeal involves a matter within the jurisdiction of the Board of Variance,

c) if the appeal is outside the jurisdiction of the Board of Variance to notify the appellant,

d) if it is within the Board's jurisdiction to notify the chairperson of the Board of Variance of the receipt of notice of appeal,

e) to ensure that proper notification is given in compliance with this bylaw,

f) to keep proper records of the Board of Variance proceedings, and

g) to maintain a record of all decisions of the Board and make it available to the public in the municipal office (or regional district office) during normal business hours.

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* An alternate wording which may be used by regional district boards or island trust committees is: "Pursuant to Section 961 of the Municipal Act, a Board of Variance is hereby established for those areas of the regional district for which zoning bylaw "100" is applicable".

b) In the event that no notice of appeal is deposited with the Secretary to the Board of Variance at least 7 calendar days prior to the date of the next meeting, then no meeting need be held.

c) A meeting of the Board of Variance on a particular appeal shall be held not more than 40 days after the date of receipt of the notice of appeal unless an extension is allowed by the written consent of the appellant.

d) The Board of Variance shall be convened by the chairperson on the date of hearing and at the time and place set out in the notice.

e) The Board of Variance shall hear all representations made to the Board.

f) The deliberations of the Board of Variance shall not be open to the public.

4. Notice of Appeal

a) Any person desiring to appeal to the Board shall file a written notice of appeal with the Secretary of the Board. The notice shall state clearly the grounds upon which the appeal is based and the relief sought, and shall give an address to which all notices respecting an appeal hearing may be mailed.

b) Where the appeal is based upon a determination of value made pursuant to subsection (8) of section 970 of the Municipal Act, the notice of appeal shall be filed with the Secretary of the Board within 30 days of the making of the determination.

c) The Secretary, upon the filing of an appeal, shall notify the chairperson of the Board of the appeal and determine whether or not the hearing is to be held in public. The chairperson may consult other members of the Board in determining if the hearing should be public.

d) Upon receipt of the decision of the chairperson on whether there should be public notice and the determination of a hearing date, the Secretary shall send by registered mail or otherwise deliver, not less than 7 days prior to the date of the hearing, notice of the hearing to:
   i) the members of the Board of Variance,
   ii) the appellant,
   iii) the registered owners as shown on the last revised assessment roll and all occupiers of the subject property and all real property located adjacent to

the parcel which is the subject of the appeal, including those separated by private or public rights-of-way,

iv) if an appeal under 962(1)(b), the official whose interpretation is being appealed.

e) The notice of the hearing shall state the date, place and time of the appeal hearing and shall include a copy of the notice of appeal.

f) Public notice of the hearing, if ordered by the Board, shall be given by publication of a notice stating the time and place of the hearing and the general nature of the appeal in not less than 2 consecutive issues of a newspaper published or circulating in the municipality (or electoral area), with the last such publication appearing not less than 3 days nor more than 10 days before the date of the hearing.

g) The Secretary shall upon receipt of any notice of appeal, or of any written evidence entered before the hearing including staff reports, permit the same to be inspected at the Secretary's office during regular office hours.

5. Conduct of Hearing

a) A quorum for the hearing is 4 members if the Board numbers 5, and 2 members if the Board numbers 3. If the Chairman is absent for a hearing, those present may appoint an acting chairperson for the duration of that hearing.

b) Any person or body with interest in property within the municipality (or regional district) is entitled to be heard at the hearing and is entitled to be represented by a solicitor or by an agent duly appointed in writing.

c) Any person represented, in accordance with subsection 5(b), whether or not also attending in person, shall be deemed to be a party attending the hearing.

d) Evidence at a hearing may be given orally or in writing.

e) The Board shall not hear oral evidence except at a regularly constituted hearing of the subject matter of that evidence.

f) No member of the Board shall discuss the merits of the appeal with any person who is not a member of the Board or the Secretary, before the Board has reached a decision.

g) The appellant shall be afforded the first opportunity to present his evidence and arguments, and thereafter, evidence and arguments shall be presented in such sequence as the chairperson may direct until all parties to the appeal have been afforded an opportunity to present their evidence and arguments.

h) The Board may view the property affected by the appeal and surrounding properties. The Board may adjourn the hearing from time to time and may reconvene without further published notice if the time, date and place of reconvening is announced at adjournment.

i) If the appellant or other persons notified do not appear at the hearing or any adjournment thereof, and have not advised the Secretary in advance that they wish to be heard at another date, the Board may proceed to decide the appeal in his absence.*

6. Decision

a) The decision of the Board shall be by a majority of those members present and made within 7 days of the hearing.

b) The Secretary shall, within 7 days of a decision, send by registered mail or otherwise deliver the written decision of the Board of Variance to the appellant, all persons who made representation at the hearing and the local government building inspector.

c) The Secretary shall, within 7 days of the decision, enter that decision in the record maintained at the local government office.

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* Section 962(2) states "...the board of variance may, after hearing the applicant and any other person notified...". It may be advisable for the Secretary to confirm whether or not applicants or those notified wish to be heard or will be in attendance.

Province of British Columbia

Ministry of Municipal Affairs and Transit

CIRCULAR

To: MUNICIPAL AND REGIONAL DISTRICT ADMINISTRATORS AND PLANNING DIRECTORS

Date: October 27, 1986

Re: Board of Variance Guide (1986 Version): Errata pp. 5 and 6

Please revise your copies of the **Board of Variance Guide** (1986 Version) by replacing the second paragraph on page 5 and the first paragraph on page 6 with the following.

Page 5, second paragraph:

> A non-conforming use is not confined only to that part of a building or structure occupied when the non-conformity was established, but can be extended throughout the whole building or structure. However, no structural alterations or additions may be made unless required by an enactment or permitted by the Board of Variance under Section 962(1):

Page 6, first paragraph:

> Where the non-conformity relates only to siting, size, dimensions or parking requirements, Section 970(9) allows the building or structure to be repaired, extended or latered without referral to the Board of Variance. Board of Variance approval is required, however, if this work would result in a further bylaw contravention, the Board would consider such a request in its normal manner under Section 962(1)(a).

Erik Karlsen

Erik Karlsen
Executive Director
Development Services Branch

86:65

ERRATA: page 30

3. Meetings

a) A meeting of the Board of Variance shall be held on the first Wednesday of each month, unless otherwise determined by the chairperson of the Board of Variance in consultation with the Secretary and all other members of the Board of Variance.

* Please revise your copies of the Board of Variance Guide (1986 Version) by inserting this paragraph on page 30/31.